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Supreme Court of the United States

OCTOBER TERM, 1945.

No. 977.

GEORGE S. ALLEN, TRUSTEE OF THE ESTATE OF ASH TRUCK LINES, INC., PETITIONER,

VS.

UNION TRANSFER COMPANY, A CORPORATION DOING BUSINESS AS UNION FREIGHTWAYS, RESPONDENT.

BRIEF OF RESPONDENT.

INGHRAM D. HOOK,
BERNARD T. HURWITZ,
JACK W. MARER,
Counsel for Respondent.

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BRIEF OF RESPONDENT.

I.

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED.

On November 24, 1944, Ash Truck Lines, Inc., was adjudged a bankrupt in the District Court of the United States for the District of Kansas, First Division, and thereafter the matter was referred to the Honorable E. R. Sloan, Referee in Bankruptcy. The bankrupt filed its

schedules which, among other things, included a list of its creditors with their addresses and amounts owed to each. There were 240 creditors listed in the bankrupt's Statement of Affairs (2). Thereafter, the Referee caused a notice to be mailed to all creditors listed in the Bankrupt's Statement of Affairs at their respective addresses as listed or as afterwards filed with the papers in the case, which notice advised the creditors that the first meeting of the creditors would be held on December 18, 1944, at 10 o'clock at the office of the Referee in Topeka, Kansas, and that at that meeting, a trustee would be elected or appointed and the assets of the bankrupt sold at public auction (3 and 7). The notice complied in all respects with Section 58 a (4) of the Chandler Act (11 U. S. C. A. 94 a (4)) (17). The Referee also caused the notice to be published as provided by Section 58 (d) of the Chandler Act (11 U. S. C. A. 94 (d)) (18). On the day and at the time and place as stated in the published and the mailed notice, the first meeting of the creditors was held, at which time George S. Allen, of Topeka, Kansas, was elected trustee of the assets and estate of the bankrupt.

Watson Bros. Transportation Co., Inc., was one of the original petitioning creditors who filed the involuntary petition in bankruptcy against the bankrupt (16). This company was represented at the first meeting of creditors by its attorney, Carll Kretsinger, who was one of the attorneys for the petitioning creditors. After the transaction of other business, the trustee proceeded to offer the assets of the bankrupt at public sale. The public sale was conducted at the office of the Referee, in his presence and in the presence of all of the creditors there assembled. The only asset of any substantial value was the Certificate of Convenience and Necessity owned by the bankrupt, issued by the Interstate Commerce Com-

mission and permitting certain truck line operations between Omaha, Nebraska, and Kansas City, Missouri, and a conforming certificate, issued by the State Corporation Commission of Kansas. These certificates had been appraised prior to the sale by an appraiser appointed by the Referee, at the value of $7,500 (17). Union Transfer Company, the appellee, was the successful bidder for the price of $4,250. All creditors present approved the sale to the appellee (2 and 17). The Referee thereupon confirmed the sale (17). The appellee paid the purchase price in full within the time provided by the order of confirmation.

Under the terms of the contract of sale, appellee had six months within which to file applications with the Interstate Commerce Commission and with the Kansas State Corporation Commission for transfer of the Certificates of Convenience and Necessity (41).

While the appellee was in the course of the preparation of those applications, including applications for temporary operating rights, and on or about January 6, 1945, one Ed Mays deposited $6,250 with the trustee as a firm bid for the Interstate and Intra-state operating rights purchased by the appellee if that sale should be set aside (18). After the filing of this bid, the trustee declined to execute the applications to transfer to appellee these operating rights, which applications to transfer were necessary for filing with the Interstate Commerce Commission and the Kansas State Corporation Commission before the appellee could secure any operating rights.

On January 27, 1945, the Consolidated Builders Supply Company, with a claim of $9 (56) and the J. I. Case Company, with a claim of $22.60 (56) filed separate applications to set the sale to the appellee aside. The application of the J. I. Case Company is identical with that of Consolidated Builders Supply Company except as to

dates, amounts and considerations (10). Both companies were represented by the same attorney. The application of the Consolidated Builders Supply Company, with the exception of caption, is set out in full on pages 8, 9 and 10 of the transcript. The grounds alleged in the application for the setting aside of the sale are (1) that the applicant received no notice of the sale and (2) if the sale were set aside at least $6,250 would be realized from the sale. These applicants were not listed by the bankrupt in its schedules as creditors and hence received no mailed notice of the first meeting of the creditors (18). On January 31, hearing was had on these applications and on the basis thereof, the confirmed sale to the appellee was set aside, the bidding reopened and Watson Bros. Transportation Co., Inc., became the successful bidder at the resale for $9,050.

Appellee filed a timely Petition for Review (24 to 32). This petition was sustained by the Honorable Walter A. Huxman (Judge of the United States Court of Appeals, for the 10th Circuit, but assigned as District Judge) on April 7, 1945, and the order of the Referee of January 31, 1945, setting aside the sale to the appellee and reselling the property to Watson Bros. Transportation Co., Inc., was vacated and set aside and the original sale to the appellee was approved and reinstated. Judge Huxman made various findings of fact and conclusions of law (51 to 54), and, in addition, wrote an opinion (55 to 59).

While Judge Huxman adopted the findings of fact made by the referee, it is doubtful if he intended to adopt referee's finding of fact No. 12, with respect to gross inadequacy of price, for in his opinion (R. 57), he says:

> "The referee found, upon considering the petition to set this sale aside, that the bid at the original sale was grossly inadequate. But he failed to find

that there were any suspicious circumstances in the conduct of that sale. He considered the sale upon the question of confirmation. He knew then that the appraised price was $7,500 and that the bid price of $4,250. He asked the creditors if anyone had any objection to the confirmation of the sale and none had. The order of confirmation recites that all creditors present unanimously approved the sale. From this, one must conclude that at that time and viewed in the light of circumstances as they existed there, everyone thought that the sale for $4,250 was an advantageous sale and cne which everybody believed should be confirmed and put through. From that we must conclude that at that time no one considered the sale price grossly inadequate. Certainly, if the creditors had thought so, they would have objected, and if the court had felt that it was grossly inadequate he would, as he had the right to do, have refused to confirm the sale. It must follow that the only basis for the referee's subsequent finding that the price was grossly inadequate must be that at that time he was informed that if a sale now were held, a bid of at least $6,250 would be secured. Does this justify the conclusion that the original sale was for such a grossly inadequate price as to shock the conscience of the court? The answer is that it does not. Everyone recognizes that inadequacy of price alone is not grounds for setting aside a sale. It follows that the fact that now it is apparent that a higher price could be obtained is likewise no grounds for setting aside the sale, neither is it grounds for concluding that the original price was grossly inadequate."

On appeal to the Circuit Court of Appeals for the Tenth Circuit, the District Court was affirmed.

II.

JURISDICTION.

The jurisdiction of this Court to entertain the petition for a writ of certiorari is admitted by the respondent.

III.

QUESTIONS PRESENTED.

Respondent denies that the statement of the questions as found in Section III of the petition, is correct or that the questions as stated have been, or are now, in the case. The simple question which confronted the referee, the District Court and the Court of Appeals, was this: *"May a referee in bankruptcy, after a valid sale made to the highest bidder for* $4,250, *which sale was approved by all of the creditors present and was confirmed by the referee, set aside that confirmed sale forty days later, upon a mere showing that if the confirmed sale is set aside, the property sold will bring at least* $6,250, *in the absence of a showing of fraud, collusion, accident, mistake or some other substantial defect for which equity would avoid a sale between private parties?"*

IV.

REASONS FOR DENYING WRIT.

1.

Respondent will take up and consider the reasons assigned by the petitioner for granting the writ in the order in which they appear in the petition.

(a) *Langnes* v. *Green,* 282 U. S. 531. This case is cited by the petitioner because in the course of the opinion, this Court had occasion to define the word "discretion." The discretion there involved was a discretion vested in the District Court to determine whether or not it would entertain jurisdiction of a proceeding. Respondent has no disagreement with the definition therein contained, but admits its complete inability to recognize wherein the cited case, or the definition contained therein, bears

the slightest resemblance to a conflict with the opinion of the Circuit Court of Appeals in the instant case.

(b) *Graffam* v. *Burgess,* 117 U. S. 180. In this case, property worth $10,000 or $11,000 was sold for a judgment of $28.95 and costs of $16.15. In addition to this shocking inadequacy of price, there was also proof of actual fraud in both the procurement of the judgment and in the circumstances of the sale. There can be no possible conflict between this case and the opinion of the Court of Appeals in the instant case.

(c) *Gelfert* v. *National City Bank,* 313 U. S. 221. This case involved the constitutionality of a foreclosure law of the State of New York, and in no way involved a sale under the bankruptcy law. The rule stated in this case was expressly followed by the Circuit Court of Appeals as will be observed from the marginal citation of the case in the Court's opinion (R. 68).

2.

Currin v. *Nourse,* 66 F. 2d 137. There is not the slightest similarity between the facts in the instant case and the facts in the cited case, and there can be no possible conflict. In *Currin* v. *Nourse,* the successful bidder submitted a long and involved contract in connection with his bid. The referee confirmed the sale to the bidder without allowing, and even refusing, to permit the common creditors to examine and analyze the contract in order to determine what benefits, if any, would accrue to them under the terms of the sale. Without an examination of this long and complicated contract, no common creditor could have the slightest notion of what the sale meant insofar as he was concerned. The arbitrary refusal of the referee to permit the common creditors to examine the contract, was, of course, an abuse of discretion, and the

Eighth Circuit quite properly held that the conduct of the referee was an act of oppression and constituted a challenge to the integrity of the sale.

3.

None of the cases cited by the petitioner under this heading have any bearing upon the question presented. It is submitted, however, that the law applicable to the facts in the case at bar has been long established, and the various district courts and circuit courts of appeal, without exception, have followed the universal rule. The statement of the rule is probably most aptly worded in *Morrison* v. *Burnette*, 154 Fed., p. 617 (l. c. 624):

> "But there is a marked and radical distinction between the situations, the rights of the parties, and the established practice before and after the confirmation of the sale. The purchaser bids with full notice that the sale to him is subject to confirmation by the court and that there is a power granted and a duty imposed upon the judicial tribunal when it comes to decide whether or not a sale shall be confirmed to so exercise its judicial power as to secure for the owners of the property the largest practicable returns. He is aware that his rights as a purchaser are subject to the rational exercise of this discretion. But after the sale is confirmed that discretion has been exercised. The power to sell and the power to determine the price at which the sale shall be made has been exhausted. From thenceforth the court and the successful bidder occupy the relation of vendor and purchaser in an executed sale, and nothing is sufficient to avoid it which would not set aside a sale of like character between private parties. Hence the rule is settled, and it seems to be universally approved, that after confirmation of a judicial sale neither inadequacy of price, nor offers of better prices, nor anything but fraud, accident, mistake or

some other cause for which equity would avoid a like sale between private parties, will warrant a court in avoiding the confirmation of the sale or in opening the latter and receiving subsequent bids (citing cases).

"This rule is so firmly established that it is no longer debatable, and the cogent and all-sufficient reason for it is that judicial sales would become farces, and rational men would shun them and refuse to bid, if after the confirmation unsuccessful bidders or dissatisfied litigants could avoid them and secure new sales by offers of higher prices, when they thought the purchase a fortunate one, and thus secure the profits in that event, and leave the buyer to suffer the losses if the property depreciated in value or the purchase was unwise. No doubt remains regarding the proper decision in this case. The sale to appellants was made on notice. The appellee, the Laurel Oil & Gas Company, made an unsuccessful bid at that sale. The lease to the appellants was executed, and they paid the amount of their bid to the court or its representative, more than three months before the sale was confirmed. The sale was confirmed, after notice, over objections, and after a full hearing. There was no fraud, no mistake, no surprise, no accident, no equitable ground for setting it aside. There was not even evidence that the purchase price was inadequate at the time of the sale. There was nothing but the mere fact that an unsuccessful bidder in March, who failed to offer more until after the sale was confirmed in June, suddenly became anxious to pay more than $5,000 above the price it had offered in March. The natural inference is that this property, which is of a speculative nature, had appreciated in value between the day of the sale and the day when this offer was made. If so, the purchaser who made the highest bid before the confirmation and paid the representative of the court the amount of it, and not the lower bidder, who paid nothing, was, after the confirmation, entitled upon every equitable principle to the benefit of the appreciation."

It should be noted that the court, in the Morrison case, expressly grounds its opinion and decision upon two Supreme Court cases cited by the petitioner (*Ballentyne* v. *Smith,* 205 U. S. 285; *Grajjam* v. *Burgess,* 117 U. S. 180). The Morrison case has been the leading case, universally followed ever since its rendition. The text book writers on bankruptcy have recognized the universal adoption of the rule in the Morrison case. The rule is stated thus in Collier on Bankruptcy, 14th Edition, Volume 4, Section 70.98, pages 1581 and 1582:

> "The setting aside of a sale is different from both the denial of confirmation and the reversal on review or of an appeal from an order of confirmation. It presupposes an otherwise complete sale—that is, normally, a sale that requires confirmation and has been duly and definitely confirmed. Its function is one of strictly equitable jurisdiction, namely to avoid a sale, public or private, that is tinged with fraud, error or similar defects which would in equity affect the validity of any private transaction. Naturally, such defects would equally justify the denial of confirmation. But proceedings to 'set aside' a sale offer an opportunity to attack on the grounds mentioned a sale already finally confirmed unless the particular defect alleged was examined in the confirmation proceedings and was held to be without merit, in which case the principle of *res judicata* would apply. Proceedings to set aside are not a second edition of the confirmation proceedings. They cannot be set in motion for reasons other than the defects of such gravity as to 'shock the conscience of the chancellor,' and even irregularities of the most serious kind that might have been, but were not, asserted in the confirmation proceedings are definitely lost and cannot be used as a ground for the request to set aside."

Remington on Bankruptcy states the rule as follows (Remington on Bankruptcy, Fourth Edition, Volume 6, Section 2569, page 60):

"After a sale has been confirmed, it can be vacated for cause, but slight cause will not suffice.

"The confirmation of the sale does not vest the legal title in the purchaser, but does vest in him the full equitable title. Before confirmation the trustee's sale is not a sale in a technical or legal sense, for, until confirmation, an accepted bidder is merely a preferred proposer or offerer; after confirmation, however, the case is different, and the confirmation cannot be vacated merely for inadequacy of price, but only for fraud, accident, mistake or some other cause for which equity would avoid a like sale between private parties."

The above stated rule was expressly followed by the District Court as will be noted by reference to the Morrison case in the Court's opinion, and the Circuit Court of Appeals expressly followed the rule as embodied in a recent Tenth Circuit decision (*Webster* v. *Barnes Banking Co.*, 113 F. 2d 1003) (R. 68).

There can be no question but that the rule has been correctly applied to the facts in the instant case. Certiorari, therefore, should not be granted unless this Court feels that it is in the public interest that the rule should be reexamined. Respondent feels that the continuance of the doctrine as embodied in the rule is most necessary to the orderly conduct of sales in bankruptcy. Sales in bankruptcy are an indispensable part of the machinery employed in administering bankruptcy estates and public policy requires stability in such sales. To induce bidding at such sales and reliance upon them, the purpose of the law should be that they shall be final and not be disturbed except upon such a showing as would justify a Court of Equity in setting aside a sale between private parties.

4.

Zimmern v. *U. S.*, 298 U. S. 167, 169. We have no quarrel with the rule in this case, and, as pointed out by the petitioner, the Circuit Court in its opinion held that there was no want of power or jurisdiction in the referee to set aside the sale. As stated by the Circuit Court (R. 67):

> "A court of bankruptcy is a court of equity. A proceeding in bankruptcy from the time of its commencement by the filing of the petition until the final settlement of the estate of the bankrupt is but one suit. A district court, for the purposes of its bankruptcy jurisdiction, is always open. It has no separate terms. The rule that a court may not vacate at a subsequent term an order made at a prior term has no application to a proceeding in bankruptcy. Proceedings in a bankruptcy suit at any time prior to its determination are open for reexamination upon application therefor in appropriate form; and any order made in the progress of the proceedings may be set aside and vacated upon proper showing made."

But the mere fact that a court has jurisdiction or power over its decrees does not mean that it can arbitrarily, or, without proper cause, set aside a valid decree previously entered. The exercise of power over its decrees by the court, must be dependent upon grounds and reasons which are advanced and, as stated by Judge Huxman in his opinion (R. 59), "which would be sufficient in an independent action to set aside the judgment." There can, therefore, be no possible confusion or conflict between the rule announced in the cited case and the bankruptcy rule announced by the Circuit Court in this case and its application of that rule to the facts.

CONCLUSION.

Much is said in the brief of the petitioner with respect to the rights of creditors and the obligation of the referee to protect those rights. It should be noted that in this case, all of the creditors present at the sale to respondent approved that sale and urged its confirmation. At that time, both the referee and the creditors believed the sale was advantageous. There was not the slightest hint or suggestion of fraud, collusion, accident or mistake nor any other grounds which would justify a Court of Equity in setting aside a sale between private parties. In this admitted state of the record, the finality and stability of confirmed sales in bankruptcy assumes a weight in the balance of interests, which tips the scales decisively. The rule followed and applied by the Circuit Court of Appeals in this case has been extant for seventy-five years and has been universally followed by district courts and circuit courts of appeal everywhere. There is a public interest in the continuance of a good rule and there is a public disservice and confusion in the reversal or abridgement of it.

It is respectfully submitted that certiorari should be denied.

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